(2007) 12 CAL CK 0050

Calcutta High Court

Case No: C.R.A. No. 34 of 2006

Rafikul Alam, Sk. Siddique, Sk. Sujit @ Nafijul, Md. Salim and Sk. Morshed @ Morai	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision: Dec. 17, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Evidence Act, 1872 - Section 114, 27, 9
- Penal Code, 1860 (IPC) - Section 392, 395, 397, 411, 412

Citation: (2008) 1 CHN 685 : (2008) CriLJ 2005 : 112 CWN 613

Hon'ble Judges: Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: P.S. Bhattacharyya and Tapas Kr. Ghosh, for the Appellant;Subir Ganguly, for the Respondent

Judgement

Kishore Kumar Prasad, J.

This appeal is directed against the judgment and order of conviction dated 13.12.2005 and order of sentence dated 14.12.2005 passed by the learned Additional Sessions Judge, 3rd Court, Suri, Birbhum in connection with Sessions Trial No. 2 of April, 2004 arising out of Sessions Case No. 2 of 1999 by which they were convicted u/s 395 of IPC and were sentenced to suffer eight years rigorous imprisonment and also to pay fine of Rs. 2,000/- each in default of payment of fine to suffer further rigorous imprisonment for two months and were further convicted u/s 412 of IPC and were sentenced to suffer eight years rigorous imprisonment and also to pay fine of Rs. 2,000/- each in default of payment of fine to suffer further rigorous imprisonment for two months.

2. The sentences awarded to them were ordered to run concurrently.

3. The narration of the prosecution case is given in details in the judgment of the learned Trial Court and it is not necessary to repeat the same in details here.

4. The case arose out of a dacoity said to have been committed in the house of the complainant Swapan Kr. Mitra (P.W. 1) on the night on 9.2.1997 at about 1.15 hours in village Sukhbazar within the limits of Ulambazar P.S. District Birbhum. According to prosecution some unknown dacoits entered the house, threatened P.W. 1 and his wife (P.W. 2) with dire consequence, struck knife blow on the abdomen of P.W. 1 when he tried to flee away and looted away several valuable golden and silver ornaments weighing 22 Bharis and cash of Rs. 57,000/- from the bedroom and the shop room of P.W. 1. After committing the looting, the dacoits left the place.

5. On the same date, the informant Swapan Kr. Mitra went to Ulambazar P.S. and lodged a written complaint (Exhibit I) disclosing the details of the operation of the dacoity. Eventually, Ulambazar P.S. Case No. 7/1997 dated 9.2.1997 u/s 392 of IPC was registered on the basis of this written complaint. The police authority took up investigation. In course of investigation, some of the stolen ornaments including cash of Rs. 2,000/- looted away by the dacoits were recovered from the house of the appellants Md. Salim and Rafiqul Alam pursuant to their statements and also from the house of appellant Sk. Sujit @ Nafijul and the same were seized under three seizure lists by the officer-in-charge, Illambazar P.S. the Investigating Officer (P.W. 11). After completion of investigation, P.W. 11 submitted chargesheet against the appellants u/s 392/395/397/412 of IPC on 31.5.1997 showing the appellant Sk. Murshid @ Morai as absconder. The case was committed to the Sessions Court. The Trial Court framed charges u/s 395/412 of the IPC. The appellants denied the charges and claimed trial.

6. Prosecution in order to establish the case against the appellants examined as many as 11 witnesses including the informant as well as his wife (P.W. 2) and the son, P.W. 3, of the informant.

7. Prosecution, during trial, also produced written complaint, seizure lists regarding recovery of some money and some incriminating ornaments, injury report of the informant, formal FIR and statements made by the appellants Rafiqul Alam and Md. Salim during investigation u/s 27 of the Indian Evidence Act leading to discovery, weighment chart of the recovered ornaments and some of the recovered ornaments including money which were marked as exhibits 1 to 9 and Mat. Exhibit I to Exhibit III (collectively).

8. The appellants did not adduce any evidence. The defence of the appellants was that they were falsely implicated.

9. The learned Trial Judge, after considering the oral and documentary evidence as well as the submissions made on behalf of the parties, found the appellants guilty u/s 395/412 of IPC and thereafter convicted the appellants and sentenced them as indicated above.

10. Being aggrieved by, and dissatisfied with, the said order of conviction and sentence, the appellants have come up with this present appeal.

11. All that now requires to be considered is whether the learned Trial Court was justified in passing the above order of conviction and sentence.

12. So far as the factum of occurrence is concerned, no argument was advanced by the learned Counsel appearing for the appellants. Learned Counsel for the appellants confined his argument only towards the involvement of the appellants in the alleged dacoity.

13. There is sufficient material on record to prove the factum of occurrence. The witnesses who have deposed on this point are P.W. 1 Swapan Kr. Mitra, P.W. 2 Nilima Mitra and P.W. 3 Sandip Kr. Mitra who are eye-witnesses to the occurrence.

14. P.W. 1 Swapan Kr. Mitra has deposed that on the night of 9.2.1997 at about 1.15 hours he and his wife while were returning from bathroom situated within a short distance from their bedroom, two dacoits caught hold of them. Accordingly, they raised alarm and then another two dacoits came there and threatened to hand over all belongings and also started assaulting them. When he replied that no money was kept in his residence but the money was kept in his shop room, then the dacoits took him to the shop room situated in the same compound. The dacoits asked him to unlock the shop room. He managed to flee away from the clutch of the dacoits and started running. The dacoits chased him and in course of chase he fell down on the ground and as such, he was again caught hold of by the dacoits. Thereafter, one of the dacoits caused hurt with a knife on his abdomen causing cut injury and being afraid he then unlocked the shop room and thereafter the dacoits took away money from his cash box.

15. P.W. 1 has further deposed that the dacoits thereafter took him inside his residential portion and looted away valuable ornaments weighing about 22 Bharis namely golden bangles, churi. one pair chur, six pairs of golden earrings, four golden chains, one pair small bangle and cash of Rs. 57,000/.

16. The above part of the evidence of P.W. 1 finds support from the testimony of P.W. 2 Nilima Mitra, wife of P.W. I.P.W. 2 was also a victim of the occurrence. She was with her husband at the moment and have faced unexpected trouble and shared the sufferings. She has also categorically stated that she and her husband were caught hold of by the dacoits and the dacoits took her husband into the shop room. Sometimes after, the dacoits took back her husband inside the residence and assaulted him. She has also corroborated the fact that the dacoits looted away valuable ornaments weighing 22 Bharis and cash of Rs. 57,000/-. She has described the item of ornaments in her evidence.

17. P.W. 3 Sandip Kr. Mitra, son of P. W. 1 has also corroborated the evidence of P.W. 1 and P.W. 2 and stated the details about the factum of occurrence.

18. From their evidence it is clear that they were present at the moment on the fateful night and they have seen the occurrence. Nothing has been elicited in their cross-examination which would detract from their evidence given in examination-in-chief so far as the factum of occurrence is concerned. From the lengthy cross-examination of these witnesses, we do not find any suggestion in the form of denial that these witnesses were not present at the time of occurrence. There is also no denial that the dacoits did enter into their residence to commit dacoity and during the course of dacoity they did take away various types of ornaments including cash of Rs. 57,000/-. The injury sustained by P.W. I in course of dacoity by one of the dacoits lend corroboration and assurance by the sworn testimony by P.W. 1 and P.W. 10, the then medical officer of Illambazar B.P.H.C. who clinically examined P.W. 1 and P.W. 2 on 9.2.1997 at 11 a.m. and found one abrasion over the left side of the belly 4 inch inside and another abrasion measuring 4 inch size over the left iliac fossa on the person of P.W. 1. P.W. 10 has also deposed that at the time of clinical examination P. Ws. 1 and 2 stated to him that they were assaulted by the dacoits.

19. The evidence referred to above is, in our opinion, sufficient to prove the factum of occurrence and looting away various ornaments and cash from the house including the shop room of P.W. 1 on the night of 9.2.1997 at 1.15 hours in village Sukhbazar within the limits of Illambazar P.S. District Birbhum. Indeed, the factum of occurrence was not disputed before the Trial Court nor it has been disputed in this Court. We. There fore, feel no hesitation in holding that the factum of occurrence has been fully established in the present case.

20. Now, comes the question of participation of the appellants in the commission of the crime.

21. We shall first deal with the case in relation to the appellant Sk. Morshed @ Morai.

22. In the instant case, it is an admitted position that T.I. parade for the purpose of identification of the appellants was not made during investigation. On 17th April, 2004 i.e. more than seven years after the occurrence, the witness P.W. 1 has only identified the appellant Sk. Morshed @ Morai for the first time before Court as one of the culprits. There is nothing in the testimony of P.W. 1 about the role actually played by this appellant during commission of crime. The evidence of P.W. 1 as regards this appellant is also not clear. That apart, none of the articles stolen in the course of occurrence was recovered from the possession of this appellant. In these circumstances, it would be very unsafe to convict this appellant for the offences punishable u/s 395 and u/s 412 of IPC on the testimony of a single witness.

23. For these reasons, therefore, we are unable to support the reasons given by the learned Trial Court in convicting this appellant under Sections 395/412 of IPC. We are clearly of opinion that the learned Trial Court committed error in law in convicting this appellant u/s 395/412 of IPC and this appellant must be acquitted of

the charges framed against him for the offences punishable u/s 395/412 of IPC.

24. In the result, the conviction of this appellant u/s 395/412 of IPC and the sentences awarded to him by the learned Lower Court under each count are set aside. This appellant who is on bail will now be discharged from his bail bond.

25. Similarly, none of the articles stolen in course of occurrence was recovered from the possession of the appellant Sk. Siddique. Accordingly, we are unable to support the reasons given by the Trial Court for convicting the appellant Sk. Siddique u/s 412 of IPC. We are clearly of opinion that the learned Trial Court committed serious error of law in convicting this appellant u/s 412 of IPC and this appellant must be acquitted of the charge framed against him for the offence punishable u/s 412 of IPC.

26. In the result, the conviction of this appellant u/s 412 of IPC and sentences awarded to him u/s 412 of IPC are set aside.

27. Now, we shall deal with the case in respect of the appellants namely Rafikul Alam, Sk. Sujit @ Nafijul, Md. Salim and Sk. Siddique of the charge framed against them for the offence punishable u/s 395 of IPC.

28. The Trial Court mainly relied on the oral evidence of P.W. 1 to P.W. 3 and P.W. 11 (I.O.) and the documentary evidence particularly, the statements made by the appellants Rafikul and Md. Salim during investigation u/s 27 of the Evidence Act leading to recovery of some of the articles stolen in course of dacoity which were identified by P.W. 1 the informant at the time of recovery as well as during trial and subsequently by P.W. 2, wife of P.W. 1.

29. Primary stand of the learned Counsel for the appellants is that the identification of these appellants before Trial Court for the first time has no legal value. Also the so-called statements made by the two appellants have no evidentiary value as it was extracted under duress.

30. Learned Counsel appearing on behalf of the State submitted before Court that the identification tests during investigation do not constitute substantive evidence and identification in Court is the substantive evidence and the discovery was made from the houses of the appellants namely Sk. Sujit @ Nafijul, Rafikul and Md. Salim pursuant to the statements u/s 27 of the Evidence Act.

31. As was observed by the Hon''ble Apex Court in Matru alias Girish Chandra Vs. The State of Uttar Pradesh, identification tests do not constitute substantive evidence. They are primarily meant for the purpose of holding the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement before Court Santokh Singh Vs. Izhar Hussain and Another, . The main object of holding an identification parade during investigation, is to test the memory of the witnesses based upon first impression and also to enable the

prosecution to decide whether all or any of them could be cited as eye-witnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Cr. PC and the Indian Evidence Act.

32. It is trite to say that substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act the position of law is well-settled by a catena of decisions of the Hon''ble Apex Court. The facts, which establish the identity of the accused persons, are relevant u/s 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The purpose of a prior test identification, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence however, is subject to exceptions when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades do not constitute substantive evidence. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting upon Kanta Prashad Vs. Delhi Administration, Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh, ; Budhsen and Another Vs. State of U.P., Rameshwar Singh Vs. State of Jammu and Kashmir, Raman Bhai Naran Bhai Patel and Others Vs. State of Gujarat, and Malkhansingh and Others Vs. State of Madhya Pradesh, .

33. The evidence against these four appellants consists of three items:

(i) that they were identified as the persons committing the crime and looted away the ornaments and cash as stated by P.Ws. 1 to 3;

(ii) that the appellants Rafikul and Sk. Salim led the police to their house on 20.2.1997 and 21.2.1997 where some of the ornaments and cash looted away in course of dacoity were recovered pursuant to their statements u/s 27 of the Evidence Act and;

(iii) some of the ornaments looted away in course of dacoity were also recovered from the bedroom of the appellant Sk. Sujit @ Nafijul, kept under the pillow in a polythene packet.

34. Turning to the first piece of evidence against these four appellants that they were identified in Court as the persons who committed the dacoity at the residence of P.W. 1.

35. On the question of identification P.W. 1 has testified as follows:

On the night of incident I was able to identify all the dacoits. All the accused persons standing in the accused box were members of the said dacoit group. (the witness identifies accused Sk. Sujit and states that this accused caused him hurt with a knife on his abdomen. This witness identifies accused Sk. Siddique and says that this accused took attempt to restrain accused Sk. Sujit from causing hurt on my person with knife).

P.W. 2 has deposed as follows on the question of identification:

On the night of incident I was able to identify some of the dacoits by their faces (this witness identifies accused Rafikul Alain, Sk. Sujit and Sk. Siddique as the members of the said dacoit group).

P.W. 3 has deposed as follows on the question of identification:

On the said night identify two of the said dacoits by flash (this witness identifies accused Sk. Sujit and Accused Sk. Siddique).

36. The above three witnesses were not suggested any enmity whatsoever between them and these appellants. P. Ws. 1 to 3 denied the suggestion that they identified these appellants before Court at the instance of the police. There were no reasons disclosed as to why these three witnesses should testify falsely against these appellants. Indeed it cannot be laid down as a proposition of law that after the lapse of a long period, witnesses would, in no case, be able to identify the dacoits whom they had seen in the course of dacoity committed during the night. In these circumstances, if the learned Trial Judge felt able to accept the evidence of identification in Court as satisfactory, this Court would not be justified in taking a different view. We also do not find from their evidence that there is no strand of truth.

37. The next piece of evidence against these appellants that two of them gave information to I.O. (P.W. 11) that they kept the stolen articles at their respective houses and pursuant to the said information P.W. 11 recovered some of the stolen ornaments and cash Rs. 2,000/- i.e. (Mat. Exhibit 1 to 3 collectively) from the house of the appellant namely Sk. Sujit @ Nafijul, Rafikul Alam and Md. Salim.

38. According to the evidence of P.W. 11 (I.O.) he arrested the appellant Rafikul Alam from his residence at village Tantgorey on 20.2.1997 and while in custody he made statement (Exhibit 7) in presence of informant and pursuant to the said statement Rafikul led him to the recovery of some stolen ornaments and cash of Rs. 2,000/- (MAT Exhibit 1 collectively) from his house and the said stolen articles were seized in presence of informant and witnesses under seizure list (Exhibit 4/2). On 20.2.1997 at about 17.45 hours P.W. 11 along with the informant had been to the house of appellant Sk. Sujit @ Nafijul at village Madarbuni, but, he did not find him at his residence. He then called some local people and in their presence he started searching the house of appellant Sk. Sujit and after searching he was able to recover

two stolen golden bala and two stolen golden chur (Mat. Exhibit 2 collectively) from his house and the said stolen ornaments were seized in presence of informant and the witnesses under seizure list (Exhibit 2/3). P.W. 11 has also testified that the appellant Md. Salim was arrested on 21.2.1997 from his residence at village Madarbuni and while in custody he made a statement (Exhibit 8) in presence of informant and the witnesses and pursuant to the said statement Md. Salim led him to the recovery of one pair of golden bouti (Mat. Exhibit 3 collectively) from his house and the said stolen bouti were seized under seizure list (Exhibit 3/3).

39. These are all the evidence both oral and documentary against these four appellants. Having carefully considered the evidence of the eye-witnesses and the Investigating Officer, we do not find in their evidence which would create doubt as regards the correctness of what they have stated about these four appellants. We see no reason to disbelieve their evidence.

40. In Section 114 illustration (a) of the Evidence Act the words "either the thief or has received goods" and more particularly, the word "or" postulates that both the presumptions cannot be drawn simultaneously. This appears to be a pointer to the proposition that one cannot be convicted with both theft and for receiving or retaining stolen property Section 411 nor Section 414 of the IPC can be applied to the original theft of the property concerned. No person can receive for himself, nor does a person assist himself in concealing. Thus, it appears that simultaneous conviction for dacoity and receiving or retaining stolen property by commission of dacoity is not permissible. As held in a case of our High Court reported in Abdul Jobbar Molla and Others Vs. Emperor, , it is quite meaningless to convict the accused both u/s 395 and u/s 412 of IPC.

41. The act of dishonest removal constitutes dishonest reception and so the thief does not commit the offence of retaining stolen property merely by continuing to keep possession of the property he stolen. The theft and taking and retention of stolen goods form one and the same offence and cannot be punished separately.

42. For the reasons aforesaid, the order of conviction and sentence awarded by the learned Trial Court against the appellants namely Rafikul Alam, Sk. Sujit, Sk. Siddique and Md. Salim of the charge framed against them punishable u/s 412 of IPC cannot be maintained and are set aside.

43. As we have already acquitted the appellants Sk. Morshed @ Morai from both the charges punishable u/s 395/412 of IPC in our preceding paragraph, this Court could not have convicted these four appellants u/s 395 of IPC. Specifically, the five appellants were alleged to have committed the offence. One appellant namely Sk. Morshed @ Morai have been acquitted, it ought to have been appreciated that only the remaining four appellants had committed the offence. Therefore, it is not proper to convict the remaining four appellants namely Rafikul, Sk. Siddique, Sk. Sujit and Md. Salim u/s 395 of IPC. The case of the aforesaid four appellants clearly falls within

the ambit u/s 392 of IPC and as such, their conviction will have to be altered to one u/s 392 of IPC from that of u/s 395 of IPC.

44. We, therefore, alter the conviction of these four appellants namely Rafikul Alam, Sk. Siddique, Sk. Sujit @ Nafijul and Md. Salim from one u/s 395 of IPC to that of u/s 392 of IPC and reduce their sentences from eight years rigorous imprisonment and also to pay fine of Rs. 2,000/- each in default to suffer further rigorous imprisonment of two months to five years rigorous imprisonment and also to pay fine of Rs. 2,000/- in default to further rigorous imprisonment for two months each. The aforesaid four appellants are in custody and they are directed to serve out the reminder part of their sentence as indicated above. The entire amount of fine if realized, shall be paid to the complainant. They shall get benefit of set off in terms of Section 428 of the Cr. PC out of the period of imprisonment already undergone.

45. The learned Lower Court is directed to issue necessary revised jail warrant as required by the Rules in respect of these four appellants. this modification, the appeal is partly allowed. were Court records with a copy of this judgment to go down forthwith to the learned Trial Court for information and necessary action. Urgent xerox certified copy of this judgment, if applied for, be supplied to-the learned Counsel for the parties on compliance of all formalities.

G.C. Gupta, J.

I agree.